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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-718

MARGARET TOWNSEND,

Petitioner,

—against—

NASSAU COUNTY MEDICAL CENTER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the District Court, which is not reported, is set out in petitioner's appendix, pp. 1a-18a. The order of the Court of Appeals vacating the District Court judgment and remanding for reconsideration, is reported at 538 F. 2d 314, and is set out in petitioner's appendix, pp. 19a-20a. The judgment of the District Court confirming its original judgment, which is not reported, is set out in petitioner's appendix, pp. 11a-22a. The opinion of the Court of Appeals, is reported at 558 F. 2d 117, and is set out in petitioner's appendix, pp. 23a-34a. The order of the Court of Appeals denying rehearing, which is not yet reported, is set out in petitioner's appendix, pp. 35a-36a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S. Code §1254(a).

Questions Presented

1. Whether petitioner made a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 in light of this Court's decision in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 53 L. Ed. 2d 786?

2. Whether statistics relating only to the general population and not to the employment practices of respondents is sufficient to raise a presumption of discrimination against a Bachelor of Science degree or an ASCP certification requirement in the sciences, as required for a Medical Technologist I position in the various medical laboratories of a large county hospital?

3. Whether an analysis of the characteristics of actual applicants is appropriate considering the facts and circumstances of the instant case?

4. Whether petitioner was denied any "substantive due process" right when she was unable to comply with a newly implemented requirement that a medical technologist I be required to have a Bachelor of Science degree, or an ASCP certification, in order to take a civil service examination notwithstanding the fact that she had been the beneficiary of a "grandfather clause", and had taken and failed said examination in 1971?

Statutes and Regulations Involved

The pertinent provision of the statute involved is set forth in the petition at p. 3 thereof. The pertinent provision of the regulation involved is 29 C.F.R. 1607.5(c)(2)(iii) at p. 10 of respondents' brief in opposition to the petition for certiorari.

Statement

On June 22, 1965, petitioner Margaret Townsend (hereinafter "petitioner") commenced work at the Nassau County Medical Center (hereinafter "NCMC") (A. 65).* Petitioner was appointed to the position of laboratory technologist I (A. 66-67). As a result of an evaluation survey conducted by the firm of Cresap, McCormick & Paget, petitioner was reclassified as a provisional medical technologist I in July 1967 (A. 68, 95). The aforementioned evaluation study, which commenced in 1965, was an undertaking to reclassify all civil service positions within Nassau County (A. 195-196, 200-201).

As a result of the Cresap, McCormick and Paget survey, the new job specifications and qualifications for the position of medical technologist I became effective in July of 1967 (A. 200). A bachelor of science degree or certification by the American Society of Clinical Pathologists (hereinafter "ASCP"), in addition to passing a competitive examination, became prerequisites for the position of medical technologist I (A. 250). Although petitioner had neither a bachelor of science degree, nor ASCP certification, by virtue of a "grandfather clause" she was permitted to take the competitive examination for the position of medical technologist I which was given on December 4,

*Refers to page numbers in Joint Appendix.

1971 (A. 80). Had petitioner passed this examination, she would have been accorded permanent status as a medical technologist I, as was Mr. Allen Scimeca (A. 161-162), regardless of whether or not she possessed any formal degrees or certification (A. 168). However, petitioner failed the examination and now seeks to be reinstated as a provisional medical technologist I.

There is no doubt that petitioner performs her work in the blood bank laboratory in a competent manner. She is highly regarded by the supervisor of the blood bank laboratory, Mr. Frank Applewaite, who like petitioner, is black (A. 131, 142). Specifically, petitioner works as a phlebotomist in the blood bank laboratory (A. 138). Of the fourteen persons who work in the blood bank laboratory under the supervision of Mr. Applewaite, only three or four persons have a medical technologist title (A. 133, 144). It appears that all the persons in the blood bank laboratory, except for the supervisor and assistant supervisor, perform the same duties, regardless of title (A. 133, 151, 174).

Even though she did not pass the examination in December, 1971, petitioner was permitted to continue in the position of provisional medical technologist I because the eligible list promulgated as a result of the 1971 examination did not contain a sufficient number of names to fill all the vacancies (A. 292).

A second examination for medical technologist I was held in April, 1973 (A. 293). Petitioner's application to take this examination was rejected by respondent Nassau County Civil Service Commission (hereinafter "Commission") because she lacked the prerequisites (i.e. bachelor of science degree or ASCP certification) for the position (A. 82). Petitioner was discharged on December 31, 1973 with three other provisional medical technologists, all of whom

were white (A. 34), as a result of the promulgation of a medical technologist eligible list based upon the 1973 examination (A. 293). Within three months petitioner was rehired by NCMC in March 1974 as a laboratory technician II, a lower graded classification than medical technologist I (A. 86).

The position of medical technologist I is utilized in all laboratories within NCMC, and is not limited to the blood bank laboratory (A. 148, 350). The job specification for medical technologist I, which came into being as a result of the Cresap, McCormick & Paget survey, was intended by those taking part in the survey to encompass duties in each and every laboratory within NCMC (A. 222).

Petitioner brought this action pursuant to 42 U.S.C. 2000e et seq. by summons and complaint dated February 25, 1975 (A. 5). Petitioner's motion for a preliminary injunction was denied by order dated May 9, 1975 (A. 2). By decision and order dated December 8, 1975 (A. 289-308), the District Court found that the prerequisites for the position of medical technologist I (i.e. bachelor of science degree or ASCP certification), while they do not operate to discriminate against blacks generally have operated to discriminate against petitioner solely because of her race in violation of 42 U.S.C. 2000e et seq.

Respondents appealed to the United States Court of Appeals for the Second Circuit from the order dated December 8, 1975 and a judgment dated February 26, 1976 (A. 331-332) of the District Court. By order dated June 21, 1976 (A. 427), the United States Court of Appeals, Second Circuit, vacated the judgment of the District Court and remanded for further hearing in light of *Washington* v. *Davis*, 426 U.S. 229, 48 L. Ed. 597 (1976). On remand, the District Court wholly failed to enunciate either verbally or otherwise, its reasons for confirming its original order

(A. 331) and subsequent judgment (A. 433-440). A judgment was made on September 27, 1976 (A. 441) adverse to respondents. Respondents served and filed a notice of appeal (A. 443) to the United States Court of Appeals for the Second Circuit, requesting a review of the District Court order and decision of December 8, 1975, the judgment of February 26, 1976 and the judgment of September 27, 1976.

On June 30, 1977, the Court of Appeals unanimously reversed the judgment with directions to dismiss the complaint on the ground that petitioner failed to make a *prima facie* case of racial discrimination. Petitioner filed a petition for rehearing on or about July 14, 1977 in light of *Dothard* v. *Rawlinson,* 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977). The petition was denied without opinion on August 24, 1977. Petitioner thereafter brought on the instant petition for a writ of certiorari in this Court which was received by respondents on November 21, 1977.

ARGUMENT

Petitioner Failed to Make a *Prima Facie* Case of Racial Discrimination and the Complaint Was Properly Dismissed.

Petitioner relies on *Dothard* v. *Rawlinson,* 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) for the proposition that general population statistics proffered in the case at bar warrant the conclusion that the plaintiff has made a *prima facie* case. Furthermore, petitioner relies upon *Dothard* v. *Rawlinson, supra,* for the proposition that there is no requirement that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants.

Respondents submit that the holding in *Dothard, supra,* does not demonstrate inconsistency with the holding in the case at bar for the following reasons.

Firstly, as far as the *prima facie* case of discrimination is concerned, petitioner adduced no evidence whatsoever of intentional discrimination, past or present, by respondents.

Secondly, statistics relating to the general population, and not to the employment practices of the respondents are not sufficient to raise a presumption against a college degree requirement, particularly in the sciences. The instant case does not concern itself with height and weight requirements as did *Dothard,* cited *supra.*

Thirdly, if bare census statistics concerning the number of blacks in the general population who have college degrees establishes a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job related. Respondents cannot agree that this was the intent or purpose of the Civil Rights Act.

Fourthly, bare figures on college degree distribution in the general population do not, in themselves, prove discrimination in fields of scientific training in which risks of human life are involved.

Fifthly, the trilogy of cases, *Dothard* v. *Rawlinson, supra, Hazelwood School District* v. *United States,* 53 L. Ed. 2d 768 (1977) and *Teamsters* v. *United States,* 52 L. Ed. 2d 396 (1977) on the use of statistics does not point to a different conclusion in the case at bar. The usefulness and relevancy of statistics depends on all of the surrounding facts and circumstances *Teamsters* v. *United States,* 52 L. Ed. 2d 396, 418 (1977). It is clear as a matter of law, that the statistics relied upon in the case at bar are irrelevant, and not sufficiently probative with respect to the Bachelor of

Science Degree requirement, or ASCP certification, in the field of scientific endeavor involving human health and life in a hospital.

Sixthly, the case at bar in all candor is not a Civil Rights case at all, although petitioner would have this Court view it as such. The case at bar in its proper prospective is simply a Civil Service case wherein no substantial Federal claim is involved. The Court is respectfully referred to respondents' brief, Point I thereof, and their reply brief in the Appellate Court below rather than a repetition of said argument.

At this point respondents are constrained to point to the attempt by petitioner to curry sympathy with this Court. At pp. 5, 6 of petitioner's brief, petitioner uses the word "fired" on three successive occasions. However, while petitioner was terminated in December 1973 because she failed to have the required college degree or ASCP certification, she was grandfathered in and did take the test in December 1971 and failed it, but was not terminated until December 1973. Additionally, petitioner was rehired by NCMC in March 1974, three months later, as laboratory technician II, albeit at a lower salary, and is employed to date by NCMC, whom she now accuses of discrimination.

Additionally, petitioner at page 7 of the petition for certiorari, footnote 7, refers to a memorandum dated August 8, 1977 from the Nassau County Civil Service Commission to Florence Turner, Personnel Officer of NCMC. Petitioner has gone outside the record on a memorandum not before the Court, nor in the record, and this should be frowned upon. However, contrary to petitioner's assertions, the said memorandum actually tightened the requirement by requiring only ASCP certification. ASCP certification requires a Bachelor of Science Degree plus laboratory training as well. The request was made by

John L. Duffy, M.D., Associate Chairman, Department of Pathology at NCMC, who was of the considered opinion that the Medical Technologist I should have training in most, if not all, areas of the laboratory. Consequently, the memorandum of August 8, 1977 can be construed only as a means of upgrading Medical Technologist I.

Petitioner's further attempt at page 13 of her brief to characterize her termination to be akin to a dismissal "because she had brown eyes or was born under the wrong sign of the Zodiac" flies in the face of reason and legal analysis and should be disregarded by this Court. Furthermore, as the Appellate Court correctly noted below, there was no violation of petitioner's rights under a "substantive due process" theory. *Townsend* v. *NCMC*, 558 F. 2d p. 121.

I

The Decision Below Is Clearly Correct

Respondents, in the Argument previously set forth, have amply demonstrated that general population statistics to establish a *prima facie* case of discrimination are not sufficiently relevant, when they do not relate to the employment practices of the respondents. The requirement of a college degree in the sciences is a neutral requirement protecting the public. The fields of scientific knowledge are too disparate, and cover too many disciplines, for the mere existence of a general college degree statistics in the general population, without more to sustain a presumption of racial discrimination. ***Townsend*** **v. *NCMC, et al.*, 558 F. 2d 117, 120 (2d Cir. 1977).**

Clearly, the position of medical technologist in a hospital involves specialized skills and is considered to be a "professional" position (A. 350, 407-422). One possessing the Civil Service title of medical technologist I is required to

be skillful in clinical chemistry, microbiology, blood-banking, serology and hematology in more than one laboratory, not just in the blood bank laboratory. The corresponding human risk factor for such a position is relatively high. For example, a mistake by a medical technician who is working in the blood bank laboratory can be the cause of a patient's disease or fatality (A. 58). Where a hospital job, such as medical technologist, involves a high human risk factor, the Equal Employment Opportunity Commission has determined that an employer's burden to prove that its qualification is job related is significantly less than where the job involves little or no human risk. 29 C.F.R. 1607.5(c)(2)(iii) states as follows:

> "(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high."

The Tenth Circuit in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (1972) has explained the employer's burden of persuasion of job-relatedness in cases such as the present as follows:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the

> economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F. 2d at 219.

See as well, *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859, 862 (7th Cir. 1974).

Analysis of the District Court's decision clearly and unmistakably reveals that Judge Weinstein of the District Court used the statistics introduced by petitioner as a vehicle to create a special position at NCMC for petitioner. This can be discerned by the conclusion reached by the District Court because while it found that the college degree requirement has a "discriminatory impact" on blacks, the District Court did not declare the job requirement at issue to be invalid or discriminatory as against any black person *except for this petitioner* (A. 304; Memorandum, p. 16). If "discriminatory impact", or "adverse racial effect" has any application at all, once such impact is found it must apply to all members of the adversely affected minority, and not only to one of those members to the exclusion of all others. The District Court was clearly erroneous in its memorandum decision in finding, on the one hand, that the educational requirement at issue has a "discriminatory impact" on blacks, yet on the other hand holding that the degree requirement is valid as to any black person seeking to be a medical technologist at NCMC except this petitioner. (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

The District Court was able to achieve this anomalous result by reliance upon a due process case decided by the

Washington, D.C. Circuit Court of Appeals.[1] In declaring the educational requirement at issue to be invalid only as to *this* petitioner, it is evident beyond cavil that the basis for this erroneous conclusion by the District Court is petitioner's satisfactory performance of her job in the blood bank laboratory, and not because of any job requirement that simultaneously has a discriminatory effect upon blacks, yet is not discriminatory against blacks.

It is respectfully submitted that doing a good job as a provisional employee within a municipal civil service system is not a ground for relief within the purview of Title VII, or any federal statute. Furthermore, if the educational requirement has a "discriminatory racial impact", then it must necessarily have an adverse discriminatory impact upon all blacks, and not solely upon petitioner who, it is conceded, does a good job in the blood bank laboratory.

Under all the facts and circumstances of this case, the Civil Service Law of the State of New York is the only applicable law, and the District Court abused its discretion and improperly applied TITLE VII to this case.

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[1] *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (1975). *Berger* is clearly inapplicable to a Title VII case. In *Berger*, plaintiff sought to have a local Washington, D.C. licensing statute declared unconstitutional as against the Due Process Clause of the Fifth Amendment. The D.C. Circuit Court of Appeals found this statute to be unconstitutional because, ***inter alia***, it denied current practitioners of psychology "grandfather rights" (i.e. permission to take the licensing examination) and because the Court found psychology to be an inexact science and a graduate degree, therefore, does not necessarily demonstrate competence. In the case at bar, ostensibly a Title VII case, the Nassau County Board of Supervisors passed a resolution (Resolution No. 1063-1968) which specifically accorded grandfather rights to petitioner and all other civil service employees similarly situated (A. 424). Furthermore, medical technology is an exact science and a bachelor of science degree is surely indicative of competence in this field. Finally, petitioner has no Due Process right to be reinstated as a provisional medical technologist I.

Reliance upon *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (D.C. Cir. 1975), that the educational requirement for medical technologist I, which the District Court simultaneously found has a "discriminatory impact" on blacks, but invalid only as to the petitioner, demonstrates beyond question that its decision was based upon petitioner's performance in the blood bank laboratory, and not upon any employment practice of respondents that has a discriminatory effect upon blacks. The facts and circumstances of this case do not justify this inconsistency, nor warrant intrusion by the federal courts pursuant to Title VII. Further abuse of the District Court's discretion was committed by unwarranted encroachment upon local sovereignty when it ordered that appellee be reinstated as a medical technologist I. *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L. Ed. 2d 245 (1976); *Bishop* v. *Wood*, 426 U.S. 341, 48 L. Ed. 2d 684, 693 (1976).

Petitioner, by reason of her provisional status, has no cognizable federal right to be retained as a medical technologist I. The fact that she has or has not been performing her job creditably is of no consequence and proffers no federal right to relief upon petitioner. *Russell* v. *Hodges*, 470 F. 2d 212 (2d Cir. 1972); *Gallagher* v. *Codd*, 407 Fed. Supp. 956 (S.D.N.Y. 1976); *Haroon* v. *Board of Education of City of New York*, 411 Fed. Supp. 61 (E.D.N.Y. 1976).

New York law gives the power to determine qualifications of applicants for promotional examination to the local Civil Service Commissions. Civil Service Law §20, subd. 1 and §52, subd. 2 (McKinney's Consol. Laws of New York Anno.); *Matter of Wirzberger* v. *Watson*, 305 N.Y. 507 (1953). It is equally clear, under New York law, that a provisional employee, such as petitioner, has no vested rights or tenure in her position. *Koso* v. *Greene*, 260 N.Y. 491 (1933). No facts were presented by petitioner that

would be sufficient to remove the instant proceeding from the application of the foregoing principles of New York law.[2]

It is respectfully submitted that this Court follow the general principle enunciated by it in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 429 (2d Cir. 1975):

> "It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and, if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators."

While it is clear that federal courts are empowered to examine and pierce state laws in the framework of federal civil rights enactments, the case at bar does not present such a factual situation that justifies or warrants such a confrontation. It is respectfully submitted that the Court should defer to the classification for medical technologist I established by respondent Civil Service Commission.

By its strained and erroneous interpretation in applying Title VII to the case at bar, the District Court has, in effect, created reverse discrimination within the NCMC. In *Milson* v. *Leonard*, —— Fed. Supp. ——, E.D.N.Y.

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[2] The original impression of the District Court, i.e. that this case presented only a "bureaucratic" problem, is the correct impression of the case at bar. The District Court noted:

> "But, my problem is not whether individuals are crushed by the machinery or bureaucracy, because that happens all the time. That is not what the court is here for, to rectify every injustice. There must be an injustice as to whites as well as blacks in that hospital. My problem is whether you have made out a case based on race." (A. 182).

See, as well the dialogue between the District Court and Mr. Allen Scimeca, at A. 154-155.

Docket No. 74 C 904 (1975, Dooling, J.), (App. 1A) plaintiff, a white female, brought suit against the Nassau County Civil Service Commission (hereinafter "Commission") to be reinstated provisionally, as a medical technologist III at NCMC, and to be accorded an opportunity to take the April 1973 examination for permanent status in that position. (Slip Op., at pp. 1-2). The Commission excluded plaintiff from the April 1973 examination on the ground that she lacked the educational requirements for the position (Slip Op., at p. 3). The court, in *Milson, id.*, dismissed plaintiff's complaint pursuant to Fed. R. Civ. P. 56, finding that plaintiff did not and could not present a claim for relief that is cognizable by a federal court. The court, in *Milson, id.*, also noted that "questions of jurisdiction are troublesome." (Slip Op., at p. 5).

The decision of the District Court left NCMC and the Commission in a position where a white woman who, like petitioner, was a provisional employee, and who, like petitioner, was performing competently in her provisional position, yet who, unlike petitioner, has no right to be reinstated in her provisional position with full back pay. The decision of the District Court constitutes nothing more than reverse discrimination and should be reversed. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 US 273, 49 L. Ed. 2d 493 (1976); *Kirkland* v. *New York State Board of Correctional Services, supra.* This is particularly true in the case at bar, where the effect of the decision of the District Court will not be diffused among an unidentifiable group of persons, but will and does affect a small number of readily identifiable persons. *Equal Employment Opportunity Commission* v. *Local 638*, 532 F. 2d 821, 828 (2d Cir. 1976).

Respondent is also compelled to note that the District Court wholly failed to reconsider its original decision in

light of *Washington* v. *Davis,* 426 U.S. 229, 48 L. Ed. 2d 597 (1976) as instructed by the United States Court of Appeals, 2d Circuit (R. 19a, 20a) *Townsend* v. *Nassau County Medical Center, et al.,* 538 F. 2d 314 (2d Cir. 1976). The Court is respectfully referred to Point III of respondents' brief in the Appellate Court below for a full discussion of this issue.

In sum, it is clear that petitioner failed to prove a *prima facie* case of racial discrimination and the complaint was properly dismissed.

II

There Is No Conflict of Decision

Petitioner alleges at pp. 8, 9 of her brief that *Townsend* v. *Nassau County Medical Center, et al.,* 558 F.2d 117 (2d Cir. 1977) with respect to the *prima facie* case is contrary to *Dothard* v. *Rawlinson,* cited *supra,* and the Appellate Court below's decision conflicts with the decisions of three other circuits. Petitioner also contends that as a practical matter, the Appellate Court below could not have been aware of *Dothard* v. *Rawlinson,* cited *supra,* because it was decided just three days prior to the decision in the case at bar.

At the outset, it should be noted that petitioner submitted a petition for rehearing in *Townsend* on or about July 14, 1977 to the United States Court of Appeals for the Second Circuit. The petition for rehearing was denied on August 24, 1977 (35a, 36a), over a month later. The touchstone of petitioner's rehearing motion was precisely *Dothard* v. *Rawlinson.* It may fairly be presumed that the United States Court of Appeals thoroughly reviewed all aspects of *Dothard* and found no merit whatsoever to petitioner's

Dothard contention since the petition was denied without the Court requesting an opposing brief from respondents, (Rule 40, Federal Rules of Appellate Procedure).

Petitioner's proffered argument that the Second Circuit's holding in *Townsend* v. *Nassau County Medical Center, supra,* conflicts with three other circuits is groundless.

In *Townsend* v. *Nassau County Medical Center, supra,* the Court stated:

> "Neither *Griggs, supra,* nor *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F. 2d 1361 (5th Cir. 1974), or *United States* v. *Georgia Power Co.,* 474 F. 2d 906 (5th Cir. 1973), relied upon by appellee, support the proposition that statistical evidence concerning only the general population is sufficient to demonstrate that a job prerequisite 'operates to exclude' minorities. In all of these cases plaintiffs established that virtually no blacks were *in fact* able to satisfy the challenged job qualification and obtain employment with the defendant.
>
> If we were to hold that a bare census statistic concerning the number of blacks in the *general population* who have college degrees could establish a *prima facie* case of discrimination, every employer with a college degree requirement would have the burden of justifying the degree requirement as job-related. See *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). The burden of showing job-relatedness cast upon the employer does not arise until the discriminatory *effect* has been shown. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, at 137 n. 14, 97 S. Ct. 401, 408-09, 450 L. Ed. 2d 343 (1976). 'This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination.' *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405,

425, 95 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975). We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption against a college degree requirement." (558 F. 2d p. 120)

The Court is respectfully referred to footnote 6 at 558 F. 2d p. 120 for a further detailed commentary by the United States Court of Appeals for the Second Circuit.

In retrospect, the Appellate Court below's analysis squarely meets petitioner's arguments broached in her petition (pp. 9, 10).

Finally, petitioner relies on *Dothard* v. *Rawlinson,* cited *supra,* for sustaining her position that she sustained her *prima facie* case. Respondents reiterate each and every argument submitted to this Court contained in the Argument previously stated. Respondents also point out that the very language quoted by petitioner (petitioner's brief pp. 8, 9) does not offer any succor or sustenance for her *prima facie* argument.

In *Dothard* v. *Rawlinson, supra,* this Court stated:

"There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." (53 L. Ed. 2d p. 798).

This court did not mandate that an analysis of the characteristics of actual applicants is barred. On the contrary such analysis may be relevant depending upon the facts and circumstances of a particular case. For this reason, respondents' arguments contained in Point II of their brief in the Appellate Court below is most appropriate and ap-

plicable under the factual pattern in the case at bar. Furthermore, petitioner's statistics do not reflect those college graduates having Bachelor of Science degrees.

The Appellate Court below stated:

"There were no statistics for the B.S. degree in particular." (558 F. 2d p. 120)

Therefore, petitioner's proffered statistics fall short in terms of germaneness and relevancy. In *Dothard* v. *Rawlinson,* cited *supra,* this court, by virtue of the "moreover" statement (53 L. Ed. 2d p. 798) that reliance on general population demographic data was not misplaced does not work adversely to respondents. Simply stated in the case at bar, we are dealing with a medical technologist I who is required to be competent in different scientific laboratories of a hospital, and there is reason and justification for a high level of expertise and competency. It is clear that petitioner's evidence on its face fails to demonstrate conspicuously a job requirement's grossly discriminatory impact.

III

There Is No Substantial Question Affecting the Enforcement of a Pervasive Federal Law

Respondents contend that under all the facts and circumstances in the case at bar, petitioner has failed to raise a cognizable claim within the ambit of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) Respondents also argue that the District Court erred in its analysis of the applicability of Title VII to the facts of this case. The District Court's unwarranted intrusion into a situation that presented itself as nothing more than the internal administration of a local civil service matter justified a

reversal and dismissal of the complaint by the United States Court of Appeals for the Second Circuit.

As the United States Court of Appeals, Second Circuit, correctly and unanimously noted in *Townsend* v. NCMC, 558 F. 2d 117:

> "We feel constrained to say that, on these facts, were the District Court judgment to stand, this hard case would make bad law .... In any event, should a college degree requirement ever be interposed as a prerequisite simply as a pretext for disqualifying members of the black community, the courts will be alert to deal with violations of Title VII. But we cannot say that this is such a case." (558 F. 2d p. 122).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 30, 1977

NATALE C. TEDONE
Senior Deputy County Attorney

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Deputy County Attorney

Of Counsel

APPENDIX

Memorandum and Order for Judgment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 904

JEAN MILSON,

Plaintiff,

—against—

ADELE LEONARD, as Executive Director of the Nassau County Civil Service Commission, and the NASSAU COUNTY CIVIL SERVICE COMMISSION,

Defendants.

Appearances:

JAMES N. GALLAGHER, Esq. (JOHN F. O'SHAUGHNESSY, Esq., County Attorney, of Counsel), *for defendants*

ALLEN R. MORGANSTERN, Esq. (RICHARD HARTMAN, Esq., of Counsel), *for plaintiff*

DOOLING, D.J.

Plaintiff sues to be reinstated, provisionally, in the job of medical technologist III at Meadowbrook Hospital until she is accorded a chance to take the civil service examination necessary to attain recognized permanency in that position. She has been since May 1974 (as of January 1, 1974) a medical technologist II at the Meadowbrook Hospital; she has recognized permanency in that position by virtue of her having passed the April 1973 examination

for the position. Plaintiff's complaint is that she was wrongfully denied admission to the April 1973 examination for medical technician III, and so was denied a fair chance to gain permanency in her provisional employment as a medical technician III, a position she had held on a provisional basis from July 7, 1967 until the end of 1973. At that time, she had to yield the provisional position to an appointee who had passed the April 1973 test. The difference in annual salary between the two positions is nearly $5,500.

The controversy grows out of a reclassification of jobs in July 1967. Plaintiff was then working as a "senior microbiologist." County records show that she had not been awarded permanent but only provisional status in that job. She did, however, have permanency as a microbiologist. When the jobs were reclassified, a microbiologist became a "medical technician I" and a senior microbiologist became a "medical technician II." A "principal microbiologist" became a "medical technician III." Although plaintiff had never held the position of senior microbiologist with permanency, she nevertheless jumped to a provisional medical technician III on July 7, 1967, a job two promotion steps above the new titular position to which her permanent status as a "microbiologist" entitled her.

Pursuant to a special resolution of the County Supervisors plaintiff was permitted, as an actual "incumbent" of a medical technician III position to take the 1969 test for medical technician III without satisfying the training and experience requirements established for that position. She took and failed the test. She was, through error, allowed to take the next test for the III job in December, 1971, and again she failed to pass the test. During all this time she continued in the job as a provisional III.

Plaintiff was, however, excluded from the next III test given on April 1973, on the ground that she did not meet the educational or training requirements for medical technician III. She also could not qualify to take the examination as a person in direct line of promotion because she only had permanency as a medical technician I, *two* grades below medical technician III. She did, however, take and pass the test for medical technician II, given in April 1973, and she now has permanency in that job classification. Plaintiff's present permanent position as II entitles her to take the next examination for medical technician III, however no examination is in immediate prospect.

Plaintiff asserts that her 1967 reclassification was in error, but her roster card refutes her assertions of fact, and bears out the County's contentions. It appears, moreover, that plaintiff was notified under date of July 7, 1967, that her then present title was medical technician III, that she had permanent status appropriate for medical technician I, and that to retain the III title she would have to take an examination.

On the facts, then, no ground of complaint appears. Plaintiff does not make out a case of deprivation of right because she is, simply, wrong in her assertion that she was entitled to take the April 1973.

Plaintiff does not bring hereself within 42 U.S.C. 1320a-2. The section, added to Title 42, by Public Law 92-603 of October 30, 1972, requires the Secretary to establish a program "to determine the proficiency" of *academically* unqualified persons to perform the duties and functions of laboratory technicians, the program to include the employment of procedures for formal testing of proficiency of such persons. The statute provides that no person may be denied a rating for which he or she has actual pro-

ficiency solely because of the person's failure to meet formal educational or professional requirements. The program is related and, evidently, limited to 42 U.S.C. 1395-1395 pp —— subchapter (or "Title") XVIII, dealing with Health Insurance for the Aged and Disabled. And, quite apart from that, the testing procedures here involved do not evince the characteristics which the Secretary is authorized, in effect, to eliminate as conditions upon proficiency determination.

The questions of jurisdiction are troublesome, under 42 U.S.C. 1983 as under 28 U.S.C. 1331, but it can at least be said with some assurance that the Court may entertain the case as one for injunctive relief against the defendant Leonard under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343.

Defendants' motion, first made under Rule 12, has become a motion under Rule 56, and, since there is no genuine issue of fact, defendants are entitled to summary judgment.

It is, accordingly,

ORDERED that defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed on the merits without costs.

Brooklyn, New York
September 17, 1975.

/s/ JOHN F. DOOLING, JR.
U. S. D. J.